

JUL - 9 2007

Below is an Opinion of the Court.

LODGED \_\_\_\_\_ REC'D \_\_\_\_\_  
PAID \_\_\_\_\_ DOCKETED \_\_\_\_\_

*Randall L. Dunn*

RANDALL L. DUNN  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In Re: ) Bankruptcy Case  
JESSE ROBERT FLEISHMAN and IVONNE ) No. 07-30315-rlld13  
RAQUEL FLEISHMAN, ) MEMORANDUM OPINION  
Debtors. )

In this case, the parties seek a determination as to whether the debtors' unborn child is a member of their household. Resolution of this issue bears directly on the duration of the debtors' plan in chapter 13, as the size of their household in relation to their combined income determines whether the debtors' family income is above or below the median for purposes of establishing the "applicable commitment period" for plan payments under the Bankruptcy Code. I conclude: (1) for purposes of calculating the "applicable commitment period," the debtors' household does not include unborn children, and (2) the "applicable commitment period" is determined as of the plan confirmation date. My reasons follow.

26       ///

### Factual Background

The facts are undisputed. Jesse R. and Ivonne R. Fleishman ("Debtors") filed their chapter 13<sup>1</sup> bankruptcy petition on February 1, 2007. The Debtors stated on their Schedule I, filed February 14, 2007, that they had a one and one-half year-old son, but were expecting another child on or about June 27, 2007.

7           Also on February 14, 2007, the Debtors filed their B22C  
8 "Chapter 13 Statement of Current Monthly Income and Calculation of  
9 Commitment Period and Disposable Income" ("B22C"). In calculating the  
10 "applicable commitment period" for plan purposes in the B22C, the Debtors  
11 listed their household size as four, based on the fact that their unborn  
12 child would be a part of their household from June 2007 through the  
13 remaining life of their chapter 13 plan. On the same date, the Debtors  
14 filed their chapter 13 plan ("Plan"), estimating the approximate length  
15 of the Plan at 58 months in order to pay secured debt obligations.

16 On March 13, 2007, the chapter 13 trustee ("Trustee") filed an  
17 objection to the Plan, based, in part, on the household size of four set  
18 forth on the B22C. The Trustee filed a supplemental objection on May 17,  
19 2007, arguing that the "applicable commitment period" for Plan purposes  
20 should be 60 months, rather than 36 months, as calculated on the B22C.

The Debtors' combined annual income, as calculated and set

<sup>1</sup> Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, incorporating the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, April 20, 2005, 119 Stat. 23 ("BAPCPA"), as the Debtors' chapter 13 petition was filed after the general BAPCPA effective date (October 17, 2005).

1 forth on their B22C, is \$61,945.00. If the Debtors' unborn child is not  
2 included as a member of their household, the household size is three, for  
3 which the Oregon median income is \$55,104.00. If their unborn child is  
4 considered a member of their household, the household size is four, for  
5 which the Oregon median income is \$63,946.00.

6 After briefing by the parties, the matter was heard on June 7,  
7 2007. At the hearing, I listened to argument and took the matter under  
8 advisement.

9 Jurisdiction

10 I have jurisdiction to consider and rule on the Trustee's  
11 objections to the Plan as "core" matters under 28 U.S.C. §§ 1334 and  
12 157(b)(2)(L).

13 Issues

14 Whether an unborn child is a member of the Debtors' household  
15 for purposes of determining the applicable median family income in  
16 calculating the "applicable commitment period."

17 Whether household size is determined as of the petition date,  
18 as of the date of confirmation of a chapter 13 plan, or on some other  
19 date(s) for purposes of determining the "applicable commitment period."

20 Discussion

21 Deciding the issues before me requires consideration and  
22 interpretation of provisions of a number of sections of the Bankruptcy  
23 Code. In this context, it is important at the outset to state what I am  
24 not determining in this case. At oral argument, I specifically asked  
25 counsel for both parties if they were looking for a decision on the  
26 impact of the Debtors' impending blessed event on their "projected

1 disposable income," for § 1325(b)(1)(B) purposes. Both parties stated  
2 that "projected disposable income" was not a matter in dispute, at least  
3 at the time of the hearing. Accordingly, I leave that issue for another  
4 day, although the case clearly is pregnant with it.

5 The issue that I must decide is the appropriate applicable  
6 commitment period for the Plan. The term "applicable commitment period"  
7 is introduced in § 1325(b)(1), which provides in relevant part

8 If the trustee or the holder of an allowed unsecured  
9 claim objects to the confirmation of the plan, then  
the court may not approve the plan unless, as of the  
effective date of the plan-

10 . . .  
11 (B) the plan provides that all of the  
12 debtor's projected disposable income to be  
13 received in the applicable commitment  
period beginning on the date that the first  
payment is due under the plan will be  
14 applied to make payments to unsecured  
creditors under the plan.

15 (Emphasis added.)

16 "Applicable commitment period" is defined in § 1325(b)(4).

17 For purposes of this subsection, the 'applicable  
18 commitment period'--

19 (A) subject to subparagraph (B), shall be-  
20 (i) 3 years; or  
21 (ii) not less than 5 years, if the  
22 current monthly income of the  
23 debtor and the debtor's spouse  
24 combined, when multiplied by 12, is  
25 not less than-  
26 (I) in the case of a debtor in a  
household of 1 person, the median  
family income of the applicable  
State for 1 earner;  
(II) in the case of a debtor in  
a household of 2, 3, or 4  
individuals, the highest median  
family income of the applicable  
State for a family of the same

number or fewer individuals; or  
(III) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus \$525 per month for each individual in excess of 4; and

(B) may be less than 3 or 5 years, whichever is applicable under subparagraph (A), but only if the plan provides for payment in full of all allowed unsecured claims over a shorter period.<sup>2</sup>

9 The terms "household," "person" and "individuals" used in § 1325(b)(4)  
10 are not defined in the Bankruptcy Code. Nor is the BAPCPA legislative  
11 history helpful in divining how those terms are to be interpreted.

12 Consistent with the preamble to § 1325(b)(1), issues as to the  
13 appropriate "applicable commitment period" arguably only would arise in  
14 situations where the chapter 13 trustee or an unsecured creditor objects  
15 to confirmation of the debtor's chapter 13 plan. In this case, of  
16 course, the Trustee has objected. However, under the current Federal  
17 Rules of Bankruptcy Procedure, all chapter 13 debtors are required to  
18 calculate the "applicable commitment period" for their cases and file a  
19 document including such calculation on or about the time of filing. See  
20 Fed. R. Bankr. P. 1007(c). Interim Rule 1007(b)(6) specifically  
21 provides:

22 A debtor in a chapter 13 case shall file a statement  
23 of current monthly income, prepared as prescribed by  
24 the appropriate Official Form, and, if the debtor has  
current monthly income greater than the median family  
income for the applicable state and family size, a

26       <sup>2</sup> The Plan does not provide for full payment of the allowed claims  
of general unsecured creditors; so, § 1325(b)(4)(B) does not apply.

1                   calculation of disposable income in accordance with  
2                   § 1325(b)(3), prepared as prescribed by the  
3                   appropriate Official Form.

4                   The relevant Official Form is the B22C, which requires in Part  
5                   II, Section 16, entitled "Applicable Median Family Income," that the  
6                   debtor

7                   [e]nter the median family income for applicable state  
8                   and household size. (This information is available by  
9                   family size at [www.usdoj.gov/ust/](http://www.usdoj.gov/ust/) [the "U.S. Trustee  
10                  Web Site"] or from the clerk of the bankruptcy court.)

11                  The U.S. Trustee Web Site advises that the information  
12                  applicable for completing Part II of the B22C "is published by the Census  
13                  Bureau according to State and family size and is adjusted each year." In  
14                  fact, "median family income" generally is defined in § 101(39A), added in  
15                  BAPCPA, as follows:

16                  The term "median family income" means for any year -  
17                   (A) the median family income both calculated and  
18                   reported by the Bureau of the Census in the then  
19                   most recent year. . . .

20                  A. A household consists of persons living outside the womb.

21                  The U.S. Census Bureau ("Census Bureau") defines "household" as  
22                  follows:

23                  A household includes all the persons who occupy a  
24                  housing unit. A housing unit is a house, an  
25                  apartment, a mobile home, a group of rooms, or a  
26                  single room that is occupied (or if vacant, is  
                        intended for occupancy) as separate living quarters.  
                        Separate living quarters are those in which the  
                        occupants live and eat separately from any other  
                        persons in the building and which have direct access  
                        from the outside of the building or through a common  
                        hall. The occupants may be a single family, one  
                        person living alone, two or more families living  
                        together, or any other group of related or unrelated  
                        persons who share living arrangements. (People not

1 living in households are classified as living in group  
2 quarters.)  
3 . . .  
4 Households with Individuals under 18 years include[]  
5 not only families with related children but also all  
6 other households in which a person under 18 is  
7 present. . . .

8 The Census Bureau does not define the terms "person" or "individuals."  
9 However, consistent with the Census Bureau's functions to gather  
10 information from individuals and establishments from which to compile  
11 statistics,<sup>3</sup> it makes no sense to interpret "person" or "individual" as  
12 including unborn children for purposes of determining how many "persons"  
13 occupy a housing unit. For example, some pregnancies terminate before a  
14 child is born. Counting such pregnancies as "persons" automatically  
15 would build inaccuracies into the statistics the Census Bureau is charged  
16 with compiling as accurately as possible.

17 Interpreting "households" as not including unborn children is  
18 consistent with other authorities under federal law. In computing  
19 personal exemption deductions under federal tax law, courts have held  
20 that unborn children are not "persons" or "individuals" for exemption  
21 purposes. See Wilson v. Comm'r, 41 B.T.A. 456 (Bd. of Tax Appeals 1940):

22 The word 'person' as used in section 25(b)(2) is to be  
23 taken in its normal, everyday sense of a living human  
24 being, a man, woman, or child, an individual. . . .  
25 The interpretation which petitioners suggest is so  
26 obviously strained as to merit little  
27 discussion. . . . Nor is the fact that, by common law  
28 and generally by statute, a child en ventre sa mere is

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deemed to be in esse for the purpose of inheritance for its own benefit persuasive here. The credit here claimed is not for the benefit of the child but of the parents.

4 The decision of the Court of Claims in Cassman v. U.S., 31 Fed.  
5 Cl. 121 (1994), is particularly useful by analogy in analyzing the issues  
6 before me. In Cassman, the taxpayer claimants sought a tax refund based  
7 on a claimed dependent exemption for a child that was not born as of the  
8 end of the subject tax year. The Court of Claims rejected the taxpayers'  
9 claim. Relevant to the argument that the Debtors' unborn child should be  
10 considered as a member of the Debtors' household, the Court of Claims  
11 considered and rejected the taxpayers' argument that their unborn child  
12 should be considered a "resident" of the United States.

Plaintiffs argue that Jonathan Cassman was a resident of the United States prior to his birth because his mother was a resident, and they ask the court to take judicial notice of the fact that it would have been physically impossible for the mother to be a resident and her unborn child not to be a resident. This argument is without merit. The court cannot justify viewing an unborn child as "residing" anywhere. . . .

18 || Id. at 126.

19                   With respect to the administrative difficulties created by  
20 recognizing unborn children as "persons" where a live birth ultimately  
21 does not result, the Cassman court stated the following:

22 [D]efendant argues, to allow a deduction based on  
23 conception, rather than live birth, would create  
24 confusion because of the uncertainty regarding the  
25 date when a particular conception occurs....The court  
26 agrees with defendant. In doing so, the court is  
concerned with the potential for increased  
administrative burdens both on the I.R.S. and on the  
taxpayers. A live birth, by operation of state and  
local law, results in the issuance of a birth

1 certificate, which is a universally accepted and  
2 administratively efficient document of  
3 identification. . . . The birth certificate itself  
4 demonstrates that plaintiffs have a son. If the court  
5 held, as plaintiffs urge, that the dependent exemption  
6 was available as of the date of conception, then the  
7 exemption would be available for pregnancies that  
8 never resulted in live births and the issuance of a  
birth certificate, including those pregnancies ending  
in miscarriages, induced abortions, and stillbirths.  
In the absence of any clear evidence of congressional  
intent to do otherwise, the court must spare taxpayers  
and the I.R.S. the administrative burden of  
establishing that such pregnancies occurred or did not  
occur.

9 Id. at 129. There is no intent of Congress reflected either in the  
10 language of the Bankruptcy Code, as amended by BAPCPA, or in its  
11 legislative history to include unborn children when the terms  
12 "household," "person" or "individuals" are used in the definition of  
13 "applicable commitment period."

14 Finally, in Cassman, the court noted that there was nothing in  
15 or about the subject statutory provisions that indicated that the terms  
16 "person" or "individual" were to be understood outside of common language  
17 use.

18 The operative word in § 152(a) in the 1954 Code and  
19 the 1986 Code is "individual." In its everyday sense,  
however, the term is synonymous with "person," the  
latter term being distinguishable only when applied to  
entities other than natural persons. Certainly,  
21 Congress did not intend to change the meaning of the  
provision when it substituted the word "individual"  
for "person." The Supreme Court, in considering the  
23 rights of the unborn under the Fourteenth Amendment to  
the Constitution, observed, after reviewing a broad  
range of common and statutory laws, that "the unborn  
24 have never been recognized as persons in the whole  
sense." Roe v. Wade, 410 U.S. 113, 162, 93 S. Ct.  
705, 731, 35 L.Ed.2d 147 (1973).

26 Id. at 124 n.3. The same can be said with regard to the use of "person"

1 and "individuals" in § 1325(b)(4).

2 As noted in Cassman, in Roe v. Wade, the Supreme Court did not  
3 recognize unborn children as having general constitutional rights as  
4 "persons."

5 In areas other than criminal abortion, the law has  
6 been reluctant to endorse any theory that life, as we  
7 recognize it, begins before live birth or to accord  
8 legal rights to the unborn except in narrowly defined  
9 situations and except where the rights are contingent  
upon live birth.

10 Roe v. Wade, 410 U.S. at 161. In its most recent decision in the  
11 abortion area, the Supreme Court has not altered that fundamental  
12 position. See Gonzales v. Carhart, 127 S.Ct. 1610 (2007).

13 The Debtors have cited a number of cases in the student loan  
14 discharge area in support of their argument that the Debtors' unborn  
15 child should be considered as a part of their household. These cases  
16 generally deal with concerns as to the subject debtors' future prospects  
17 to make payments on their student loan debts over time. Accordingly,  
18 they are much more relevant to the issue of the Debtors' projected  
19 disposable income over the life of the Plan than to a determination of  
20 the appropriate "applicable commitment period." See, e.g., Ordaz v.  
21 Illinois Student Assistance Comm'n (In re Ordaz), 287 B.R. 912, 920  
22 (Bankr. C.D. Ill. 2002) ("With the birth of her second child, [the  
23 debtor's] circumstances are not likely to improve any time soon."); Nary  
24 v. The Complete Source, et al. (In re Nary), 253 B.R. 752, 761 n.22 (N.D.  
25 Tex. 2000) ("The bankruptcy court treated the Narys as a family of five  
26 because they were expecting the birth of a child in June 2000 and any  
attempted realistic payment of the debts at issue would necessarily be on

1 a long range basis."); Williams v. Missouri Southern State College, et  
2 al. (In re Williams), 233 B.R. 423, 429-30 (Bankr. W.D. Mo. 1999); and  
3 Kincaid v. ITT Educational Serv., Inc. (In re Kincaid), 70 B.R. 188, 190  
4 (Bankr. W.D. Mo. 1986) ("[T]his is one of those rare and unusual cases in  
5 which the debtors do not have the current ability to pay and in which the  
6 future employment prospects are not promising and their economic future  
7 is further clouded by the forthcoming birth of a child.").

8 Likewise, the cases cited by the Debtors concerning issues of  
9 alleged substantial abuse in chapter 7 appear relevant to questions as to  
10 the Debtors' projected disposable income rather than to the "applicable  
11 commitment period" under the Plan. See, e.g., In re Ryan, 267 B.R. 635,  
12 637 (Bankr. N.D. Iowa 2001) ("[T]he U.S. Trustee declined to pursue a  
13 motion to dismiss under § 707(b) primarily based on Debtor's pregnancy  
14 and marital status. She is single, has a 12-year old child and is  
15 expecting a child. Mr. Schmillen points out the cost of day care alone  
16 will consume much of Debtor's future disposable income."); and In re  
17 Edwards, 50 B.R. 933, 940 (Bankr. S.D.N.Y. 1985) ("In view of the  
18 impending loss of a second income, it is apparent that projections of  
19 future ability to pay based on the present two-income status are  
20 inappropriate. Further it can be anticipated that there will be new  
21 expenses associated with the anticipated baby."). In any event, in a  
22 recent post-BAPCPA decision, in determining whether to dismiss the  
23 debtor's chapter 7 case as an abuse under the amended version of  
24 § 707(b), the bankruptcy court held that the debtor could not include her  
25 unborn child as a member of her household. See In re Pampas, 2007 WL  
26 1485352 (Bankr. M.D. La. May 21, 2007).

1                   Finally, the Debtors have attached as exhibits to their  
2 supporting memorandum references from a number of federal and state  
3 programs that specifically include unborn children in determining program  
4 eligibility. See Memo in Support of Debtors' Response to Trustee's  
5 Objection to Confirmation, Exhibits 1-7. While interesting, these  
6 exhibits are no more than consistent with the Supreme Court's  
7 determination that legal rights are not accorded with respect to unborn  
8 children "except in narrowly defined situations." Roe v. Wade, 410 U.S.  
9 at 161. In fact, the exhibit examples highlight, in contrast, that there  
10 is nothing in the Bankruptcy Code that specifically recognizes unborn  
11 children as "persons" or "individuals" or as members of "households" or  
12 suggests that Congress intended to include unborn children for  
13 consideration in determining debtors' "applicable commitment periods."  
14 In the absence of such specific inclusion, I find that under  
15 § 1325(b)(4), in defining "applicable commitment period," Congress  
16 considered households of living persons only, not including unborn  
17 children.

18  
19 B. The "effective date of the plan" under § 1325(b)(1) is the plan  
20 confirmation date.

21                   As noted above, under § 1325(b)(1), the "applicable commitment  
22 period" is determined "as of the effective date of the plan." Although  
23 the term "effective date of the plan" is used in a number of Bankruptcy  
24 Code provisions (see, e.g., §§ 1225(a)(4), 1225(a)(5)(B)(ii), 1325(a)(4),  
25 1325(a)(5)(B)(ii) and 1325(b)(1)), it is not defined in the Bankruptcy  
26 Code, and the legislative history of the Bankruptcy Code is not helpful

1 in shedding much light on the intent of Congress in using the term in its  
2 multiple settings.

3 In these circumstances, it perhaps is not surprising that  
4 courts have come to very different conclusions as to the meaning of the  
5 "effective date of the plan" in different contexts. Section 1325(a)(4),  
6 which sets the "best-interests-of-creditors" test for payments to  
7 unsecured creditors in order to confirm a plan in chapter 13, provides:

8 [T]he value, as of the effective date of the plan, of  
9 property to be distributed under the plan on account  
of each allowed unsecured claim is not less than the  
amount that would be paid on such claim if the estate  
of the debtor were liquidated under chapter 7 of this  
title on such date. . . .

11  
12 Most courts deciding "best-interests-of-creditors" test issues in chapter  
13 13 have considered a hypothetical liquidation of the debtor's assets in  
14 chapter 7 as of the petition date, and consequently have determined that  
15 for purposes of § 1325(a)(4), the petition date, in effect, is the  
16 "effective date of the plan.". See K.M. Lundin, Chapter 13 Bankruptcy  
17 Vol. 2, § 160.1 at p. 160-1 (3d ed. 2000 & Supp. 2004). The rationale  
18 for these decisions is that the rights of creditors with respect to  
19 assets of the debtor, including applicable exemptions and potential  
20 preference and avoidance recoveries, are determined as of the petition  
21 date. See, e.g., Hollytex Carpet Mills v. Tedford, 691 F.2d 392 (8th  
22 Cir. 1982); In re Green, 169 B.R. 480, 482 (Bankr. S.D. Ga. 1994); and In  
23 re Statmore, 22 B.R. 37 (Bankr. D. Neb. 1982). But see Education  
24 Assistance Corp. v. Zellner, 827 F.2d 1222, 1225 (8th Cir. 1987) (Quoting  
25 Collier's, "[t]he date of the valuation of the property to be distributed  
under the plan, as well as the date as of which the conceptualized

1 chapter 7 liquidation is to have taken place, are one and the same; both  
2 relate to the effective date of the plan. . . . Of course, the effective  
3 date of the plan cannot be antecedent to the confirmation hearing at  
4 which the issues raised by section 1325(a)(4) are to be heard by the  
5 court.”).

6 The language of § 1225(a)(4), which establishes the “best-  
7 interests-of-creditors” test in chapter 12, is identical to the language  
8 of § 1325(a)(4). However, most courts deciding “best-interests-of-  
9 creditors” test issues in chapter 12, in contrast, have applied the  
10 chapter 7 hypothetical liquidation test as of the plan confirmation date.  
11 The reasoning of these decisions is based on the courts’ conclusions that  
12 applying the “best-interests-of-creditors” test on the date when the  
13 chapter 12 plan is binding on the debtor and creditors is consistent with  
14 the language of the Bankruptcy Code and properly serves the purpose of  
15 chapter 12 to insure that creditors receive a “fair” deal under the  
16 debtor’s plan.

17 The nature of a Chapter 12 reorganization is a debt  
18 extension proceeding, not debt extinction. This debt  
19 extension process requires a departure from the  
20 approach generally applicable in chapter 7 proceedings  
21 that property of the estate be determined as of  
22 commencement of the case. Instead, property of the  
23 estate for Chapter 12 purposes includes property  
24 interests of the debtor during the pendency of the  
25 entire case, as well as property rights acquired by  
26 the Chapter 12 estate after the commencement of the  
case. Accordingly, the Section 1207 definition of  
property of the estate incorporates and expands upon  
the definition of property of the estate found in  
Section 541.

25 In re Bremer, 104 B.R. 999, 1007 (Bankr. W.D. Mo. 1989). Also see, e.g.,  
26 In re Przybylski, 340 B.R. 624, 627 n.1 (Bankr. E.D. Wis. 2006); In re

1 Novak, 252 B.R. 487, 491 (Bankr. D.N. Dak. 2000); First Nat'l Bank v.  
2 Hopwood (In re Hopwood), 124 B.R. 82, 85 (Bankr. E.D. Mo. 1991); In re  
3 Foos, 121 B.R. 778, 783 (Bankr. S.D. Ohio (1990); In re Luchenbill, 112  
4 B.R. 204, 216 (Bankr. E.D. Mich. 1990); and In re Bluridg Farms, Inc., 93  
5 B.R. 648, 653 (Bankr. S.D. Iowa 1988). But see In re Nielsen, 86 B.R.  
6 177, 178 (Bankr. E.D. Mo. 1988), applying the majority approach to  
7 interpreting § 1325(a)(4) to interpretation of § 1225(a)(4):

8 It should be noted that the wording of Section 1225  
9 and Section 1325 is identical. In interpreting the  
10 provisions of Chapter 12, courts have often turned to  
11 Chapter 13 for guidance because Chapter 12 was closely  
12 modeled after the existing Chapter 13 with alterations  
13 of provisions that are inappropriate for family  
14 farmers. In re Kjerulff, 82 B.R. 123 (Bankr. D. Ore.  
15 1987).

16 Courts generally have been resistant to the idea that the term  
17 "effective date of the plan" can be applied to a postconfirmation plan  
18 modification. See, e.g., Forbes v. Forbes (In re Forbes), 215 B.R. 183,  
19 189-90 (8th Cir. BAP 1997), and cases cited therein.

20 [T]he effective date of the plan is neither determined  
21 nor redetermined at the point of postconfirmation  
22 modification....[T]here is only one plan to which the  
23 Code refers. Regarding the effective date of the  
24 plan, there is only one plan. The effective date is  
25 not altered by modification of the plan, for the  
modified plan remains, ever constant, the plan.

26 In In re Allen, 240 B.R. 231 (Bankr. W.D. Va. 1999), faced with  
separate issues regarding valuation of collateral and determining the  
appropriate discount factor to apply with respect to a secured creditor's  
allowed claim under § 1325(a)(5), the bankruptcy court came in effect to  
two different conclusions as to the application of the "effective date of  
the plan." Echoing the majority § 1325(a)(4) view, the court determined

1 that it was appropriate to value secured creditor collateral as of the  
2 petition date because, among other reasons, "the filing date is the one  
3 which alters the rights otherwise possessed by the secured creditor under  
4 its documentation and state law to repossess the collateral, liquidate it  
5 and apply the sale proceeds to the debt." Id. at 237. However, the  
6 court considered the "key factors" in its present value determination to  
7 be "the amount, if any, to be distributed immediately upon confirmation,  
8 the amount and timing of any payments to be made over a period of time,  
9 and the applicable interest rate necessary to establish appropriate  
10 present value of those payments." Id. at 237. In light of these  
11 considerations, the bankruptcy court held that the "effective date of  
12 the plan" meant the final hearing date for plan confirmation "because  
13 that is the date on which the most currently valid information will be  
14 available to the parties and the Court to determine the present value of  
15 the payment, payments and/or stream of payments to be made by the Debtor  
16 or the Trustee to the creditor in satisfaction of its interest." Id. at  
17 238. See also In re Milleson, 83 B.R. 696, 699 (Bankr. D. Neb. 1988).  
18 In coming to its conclusions, the court in Allen made the following,  
19 common sense observations:

20 Because [in using the term "effective date of the  
21 plan"] the drafters of the Code could easily have  
22 designated something quite specific such as the date  
23 of filing or the date of confirmation, it may be that  
the term was intended to be a phrase of art to be  
determined on a case-by-case basis depending upon each  
case's particular circumstances.

24 In re Allen, 240 B.R. at 236.

25 Post-BAPCPA, at least one court has determined that a debtor's  
26 household size for "applicable commitment period" purposes is to be

1 determined at the plan confirmation date, as the "effective date of the  
2 plan." In re Anderson, 2007 WL 1112925 (Bankr. D. Kan. April 13, 2007).  
3 While the bankruptcy court in Anderson relied on prior authority within  
4 its district for that conclusion, without analysis, it does provide some  
5 useful suggestions for deciding how the term "effective date of the plan"  
6 in relation to "applicable commitment period" in § 1325(b)(1) should be  
7 interpreted.

8 Under BAPCPA, current monthly income cannot be amended  
9 during the case because it is based on concrete  
historical data. No such restriction exists in the  
Code regarding household size.

10  
11 Id.

12 Fed. R. Bankr. P. 1009(a) allows a debtor to amend the  
13 petition, schedules and statements filed with the court "as a matter of  
14 course at any time before the case is closed." The rule does not  
15 restrict the right to amend the B22C. Absent bad faith, such amendments  
16 are to be liberally allowed. See Arnold v. Gill (In re Arnold), 252 B.R.  
17 778, 784 (9th Cir. BAP 2000).

18 In interpreting the term "effective date of the plan" in  
19 § 1325(b)(1), in the absence of a definition provided by Congress, either  
20 in the Bankruptcy Code itself or in its legislative history, it is  
21 appropriate to apply a logical meaning to the term based on common  
22 language usage.

23 When interpreting an undefined term appearing in a  
24 statute, a court first looks to the plain meaning of  
the words used. When further guidance as to the  
25 meaning of a word is needed, the court may then  
consult the legislative history of the statute. When  
the legislative history does not reveal the  
26 appropriate meaning, it is helpful to resort to

1                   dictionaries and apply the common meaning of the term.

2 Cassman v. U.S., 31 F.2d at 125.

3                   "Effective" in common parlance means "ready for  
4                   service or action; to effect." "Effect" in turn means  
5                   " a quality or state of being operative." Webster's  
6                   New Collegiate Dictionary (1975). Both logically and  
7                   by definition, the effective date of a plan cannot  
8                   exist before the date the plan is filed. In other  
9                   words, a plan cannot be "ready for action" or  
10                  "operative" before its exists.

11                  In re Musil, 99 B.R. 448, 450 (Bankr. D. Kan. 1988).

12                  A chapter 13 plan generally is filed early in a chapter 13  
13                  case, but it further does not bind the debtor or other interested parties  
14                  until it is confirmed. Section 1327(a) specifically provides that:

15                  The provisions of a confirmed plan bind the debtor and  
16                  each creditor, whether or not the claim of such  
17                  creditor is provided for by the plan, and whether or  
18                  not such creditor has objected to, has accepted, or  
19                  has rejected the plan.

20                  Since the plan is not binding on the debtor and creditors in  
21                  chapter 13 until it is confirmed, and a debtor may amend the B22C freely  
22                  to recalculate the "applicable commitment period" as appropriate  
23                  postpetition, I find that it is most logical to interpret the term  
24                  "effective date of the plan," as it is used in § 1325(b)(1), to mean the  
25                  date that the plan is confirmed.<sup>4</sup> To interpret "effective date of the  
26                  plan" otherwise in this context would give the plan "effect" before it  
                        finally is approved as a binding covenant between debtors and their  
                        creditors.

27                  

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28                  <sup>4</sup> In this Memorandum Opinion, I do not address the meaning of the  
29                  "effective date of the plan" with respect to any other section of the  
30                  Bankruptcy Code where that term is used.

### Conclusion

2 In light of the foregoing, I find that at the time of the  
3 hearing on the Trustee's objections to the Plan, the Debtors had a  
4 household of three, including the two Debtors and their one and one-half  
5 year-old son, but not appropriately including the Debtors' unborn child.  
6 As such, the applicable commitment period presently is five years.  
7 Accordingly, I will sustain the Trustee's objections to the Debtors' plan  
8 and enter a 28-day order to allow the Debtors to file a modified plan.  
9 Nothing in this memorandum opinion shall preclude the Debtors from  
10 amending their B22C if circumstances change in advance of confirmation.<sup>5</sup>

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cc: Todd Trierweiler  
Brian D. Lynch, Trustee

<sup>5</sup> In interpreting the term "effective date of the plan," as used in § 1325(b)(1), as synonymous with plan confirmation, I am applying the term in the way that I find most consistent with the provisions of the Bankruptcy Code, but I am mindful that this interpretation may increase the investigative and administrative burdens on the Trustee. If an increase in household size results in a calculation of the "applicable commitment period" that reduces it from five years to three, debtors and their counsel generally can be counted on to amend their B22C's to obtain the benefit of the household increase preconfirmation.

However, households don't just increase in size. They also decrease. For example, debtors providing housing and care to an elderly relative after a stroke as of the petition date suddenly could find themselves with a smaller household in the event of such relative's death.

In a household decrease situation, where the lower household number would push the debtors from a three-year to a five-year applicable commitment period, debtors have no incentive to amend their B22C's. Trustees may have to incorporate a question(s) concerning current or projected decreases (or increases) in household size into their § 341(a) examinations of chapter 13 debtors and/or take other steps in order to ascertain currently accurate household size as of the confirmation date.